

1 IN THE UNITED STATES DISTRICT COURT.

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 UNITED STATES OF AMERICA, )

5 Plaintiff, )

Case No. 3:12-CV-2265-SI

6 v. )

February 19, 2013

7 CITY OF PORTLAND, )

8 Defendant. )

Portland, Oregon

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14 STATUS CONFERENCE

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE MICHAEL H. SIMON

17 UNITED STATES DISTRICT COURT JUDGE  
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1 TRANSCRIPT OF PROCEEDINGS

2 THE COURT: Good morning.

3 DEPUTY COURTROOM CLERK: Your Honor, this is the  
4 time set for hearing in Civil Case 12-2265-SI. United  
5 States of America v. City of Portland.

6 Counsel, beginning with plaintiff, would you please  
7 identify yourself for the record?

8 MS. BROWN: Adrian Brown for the United States.

9 MR. GEISSLER: Jonas Geissler, Civil Rights  
10 Division, DOJ, for the United States.

11 If Your Honor please, we would have one specific  
12 factual notation to make on the record before His Honor  
13 reads his opinion.

14 THE COURT: Sure.

15 MR. WILLIAMS: Good morning, Your Honor,  
16 Bill Williams on behalf of the United States.

17 MS. ALBIES: Good morning, Your Honor,  
18 Ashlee Albies on behalf of intervener -- proposed intervener  
19 Albina Ministerial Alliance and with me is Shauna Curphey.

20 MR. KARIA: Good morning, Your Honor. Anil Karia  
21 on behalf of proposed intervener Portland Police  
22 Association.

23 THE COURT: And how are you feeling, Mr. Karia?

24 MR. KARIA: I feel better.

25 THE COURT: I'm glad to see you here.

1 MS. OSOINACH: Good morning, Your Honor,  
2 Ellen Osoinach on behalf of City of Portland.

3 MR. VAN DYKE: Good morning, Your Honor,  
4 Jim Van Dyke on behalf of the City of Portland.

5 THE COURT: Good morning. The United States may  
6 proceed.

7 MR. GEISLER: Thank you, Your Honor.

8 We understand Your Honor has written in an email  
9 correspondence to counsel in this case that the Court has  
10 already issued -- already offered an opinion. Your Honor,  
11 we would like to make one specific notation to preserve the  
12 record. Your Honor, the United States unconditionally and  
13 unequivocally waives any specific cause of action against  
14 PPA members or the PPA for the sake of the specific §14141  
15 cause of action in this particular case.

16 That's not to say that should -- in the future, should  
17 any cause of action arise either criminally or civilly,  
18 based upon past or future comment, that the cause of action  
19 would be waived; but, rather, for the sake of this case, we  
20 believe this case is restructured such that it would exclude  
21 the PPA for the sake of the merits phase of this cause of  
22 action.

23 THE COURT: All right. Thank you.

24 MR. GEISLER: Thank you, Your Honor.

25 That doesn't necessarily affect how I view things right

1 now, because my tentative thinking is not to address and to  
2 defer ruling on the merits issues relating to the motion to  
3 intervene. In a few moments -- let me share with you my  
4 tentative thinking on the pending motions to intervene and  
5 where we go from here. I will concede and be candid that  
6 tentative probably understates the degree of my thinking on  
7 this, but I will allow you all to let me know whether you  
8 think I've made any factual or legal mistakes in my  
9 tentative analysis, but what I'm planning on doing is ruling  
10 on the pending motions to intervene for purposes of the  
11 remedy phase and the remedy phase only and deferring any  
12 ruling on any motions to intervene with respect to the  
13 liability phase. We may or may not ever get there. So I  
14 want to take things one step at a time.

15 After I share with you my analysis on the motions to  
16 intervene with respect to the remedy phase, I'll share with  
17 you my analysis of where we should go from here. And then I  
18 will open it up for any comments that you all wish to make.

19 But I want to begin -- frankly, I'll get right to the  
20 bottom line of my tentative conclusion, and then I'll  
21 explain how we get there. I'm thinking that with respect to  
22 the Portland Police Association's motion to intervene with  
23 respect to the remedy phase, I'm going to grant that motion.  
24 I believe that I must grant that motion. And, therefore,  
25 I'm going to -- my inclination, and then I would be

1 deferring ruling on the PPA's motion to intervene with  
2 respect to liability issues.

3 With respect to the motion to intervene brought by the  
4 AMA Coalition, I am going to deny the motion to intervene on  
5 the remedy phase. I'm going to defer ruling on the motion  
6 to intervene by the AMA Coalition with respect to liability,  
7 just like with the PPA, but I'm going to grant the AMA  
8 Coalition what I've been calling in my written opinion that  
9 I'll be releasing later today enhanced amicus status. And  
10 I'll describe that in a few moments in greater detail, but  
11 essentially it will give the AMA Coalition a seat at the  
12 table at least for purposes of discussing remedy issues.

13 Let me explain very briefly what my thinking is here  
14 and then where I see this going, and then I'll turn it over  
15 to you, as I said.

16 I start with a statement from the Ninth Circuit, a City  
17 of Los Angeles case, and in that statement the Ninth Circuit  
18 itself is quoting and citing two U.S. Supreme Court cases.  
19 The *Local 93 International Association of Firefighters* case  
20 from the Supreme Court in 1986, and the *W.R. Grace v. Local*  
21 *Union 759* case from the U.S. Supreme Court in 1983. Here's  
22 what the Ninth Circuit says and attributes to, as legal  
23 authority, those two Supreme Court cases: Except as part of  
24 court-ordered relief after a judicial determination of  
25 liability, an employer cannot unilaterally change a

1 collective bargaining agreement as a means of settling a  
2 dispute over whether the employer has engaged in  
3 collective -- excuse me, has engaged in constitutional  
4 violations.

5 So as we look at things here, the City of Portland is  
6 the employer, and it has a collective bargaining agreement  
7 with the Portland Police Association. There are allegations  
8 made by the United States that the City of Portland has  
9 engaged in constitutional violations, and this Court does  
10 have the authority, by injunctive relief, to change the  
11 provisions of a collective bargaining agreement, but it can  
12 only do so after a judicial determination of liability.

13 Now, that might occur after a trial on the merits and  
14 that might occur even after summary judgment, but it cannot,  
15 and the Ninth Circuit has made this clear in the *City of Los*  
16 *Angeles* case, it cannot occur simply by means of approving a  
17 settlement agreement entered into between the United States  
18 and the City of Portland if it would result in a change in  
19 the collective bargaining agreement between the City of  
20 Portland and the Portland Police Association.

21 So that leads, then, to the question of does it?

22 Now, I'm not ready to rule on that question, but I will  
23 state that for purposes of a motion to intervene, and my  
24 comments right now are directed primarily to the Portland  
25 Police Association's motion -- I'll get to the Albina



1 Coalition -- the AMA Coalition motion in a few minutes, but  
2 when I looked at intervention as of right, I looked to Rule  
3 24(a)(2), or the Federal Rules of Civil Procedure (a)(1),  
4 which conveys a right to intervene when a statute grants it.  
5 That's really not applicable. As everyone recognizes,  
6 there's no such statute.

7 So we look at 24(a)(2). We know the general criteria  
8 there is that to intervene as of right an applicant must  
9 meet four requirements and must have significant protectable  
10 interests relating to the property or transaction that is  
11 the subject of the action. The disposition of the action  
12 may -- and I note here the word "may" -- as a practical  
13 matter, impair or impede the applicant's ability to protect  
14 that interest or its interest.

15 Third, the applicant -- the application is timely.  
16 That's not an issue here. Every application we're  
17 confronted with was within my order regarding the timeliness  
18 of applications.

19 And then, fourth, the existing parties, United States  
20 and the City of Portland, may not adequately represent the  
21 applicant's interest.

22 Now, as applied to the Portland Police Association,  
23 here's how I analyze it: The Portland Police Association  
24 asserts that it has a significant protectable interest  
25 because the terms of the proposed settlement agreement

1 conflict with the provisions of the collective bargaining  
2 agreement, what I refer to generally as the labor agreement  
3 between the City and the Portland Police Association, and  
4 the Portland Police Association contends that the settlement  
5 agreement, at least portions of it, infringe on the Portland  
6 Police Association's state law bargaining rights. They add  
7 that the disposition may impair or impede the Portland  
8 Police Association's continuing ability to protect and  
9 enforce its contractual rights with the City and that  
10 neither the City nor the United States can adequately  
11 represent the Portland Police Association's interest, for,  
12 among other reasons, the City is the employer of the members  
13 of the Police Association, and the City and the Police  
14 Association, at least, you know, in name, and probably in  
15 reality, are antagonists in the collective bargaining  
16 process.

17 Now, the City concedes that the Portland Police  
18 Association is entitled to intervention as of right, at  
19 least in the remedy phase of litigation, and I agree. The  
20 United States, although it doesn't make that concession,  
21 admits that the PPA, the Portland Police Association, has a  
22 protectable interest in the remedy phase and that, quote, a  
23 small number of the agreements provisions, closed quote, may  
24 be implicated by the settlement agreement, but the United  
25 States argues that the settlement agreement does not impair

1 the interest of the Portland Police Association because the  
2 settlement agreement preserves the Police Association's  
3 ability to collectively bargain, grieve, and arbitrate under  
4 the collective bargaining agreement.

5 But it is -- but the settlement agreement, at least as  
6 I read it, does not tell us what happens in the event that  
7 the City and the Portland Police Association might not be  
8 able to reach agreement with respect to any of the disputed  
9 issues or the conflicting issues between the settlement  
10 agreement and the labor agreement, the collective bargaining  
11 agreement.

12 Now, as I mentioned, the Ninth Circuit in the *City of*  
13 *Los Angeles* case has found that the district court does have  
14 the power to override a union's collective bargaining  
15 agreement, but not in the approval of a settlement  
16 agreement, only after a judicial determination of liability.

17 Now, the United States argues here that the Union's  
18 rights, the Police Association's rights, are not impaired  
19 for purposes of intervention, because, as speculative,  
20 whether the parties will or will not be able to reach  
21 agreement or resolve any disputes, but that precise argument  
22 was rejected by the Ninth Circuit in the *City of Los Angeles*  
23 case.

24 Now, I recognize here that the settlement agreement is  
25 a bit more ambiguous or perhaps even silent on certain

1 issues that the Ninth Circuit found troubling. Indeed,  
2 dispositive in the *City of Los Angeles* case.

3       However, as I read the proposed settlement agreement in  
4 this case, there is still a possibility that certain aspects  
5 of the implementation of the settlement agreement could  
6 conflict with the collective bargaining rights as set forth  
7 in the current version of the labor agreement; that although  
8 the parties do continue to retain the right to grieve and to  
9 bargain, that ultimately, even under the proposed settlement  
10 agreement here, the United States has reserved the right to  
11 seek judicial enforcement of the terms of the settlement  
12 agreement and therefore that remains the possibility; that  
13 if the Police Union and the City are unable to resolve their  
14 differences and certainly unable -- if they're unable to  
15 resolve their difference in a way that's satisfactory to the  
16 United States, the United States has the right, under the  
17 settlement agreement, to seek a court order to enforce the  
18 terms of the settlement agreement and thereby overrule any  
19 inconsistent provisions in the collective bargaining  
20 agreement.

21       And I think that possibility gives the Portland Police  
22 Association intervention as of right in this case.

23       Now, I want to emphasize -- and this is part of where  
24 we're going go in the next phase of this litigation. I want  
25 to emphasize that I have not concluded that the provisions

1 of the settlement agreement are inconsistent with the  
2 collective bargaining agreement, but there certainly appears  
3 to be a fair argument to that end made by the Portland  
4 Police Association, and that, I believe, is sufficient to  
5 confer on the Portland Police Association the right to  
6 intervene in this case.

7 Now, with respect to whether or not there's an  
8 impediment or impairment of the Police Association's  
9 interests, I also note that the settlement agreement, the  
10 proposed settlement agreement, doesn't state -- at least I  
11 didn't see it state in this -- that if there were a  
12 disagreement or an inability to resolve a grievance or  
13 dispute between the Police Association and the City, then  
14 the collective bargaining provisions would control. If  
15 anything, that seems to be inconsistent with the ability of  
16 the United States to seek court injunctive relief to order  
17 the City to abide by the settlement agreement if the United  
18 States believes and can show that the terms of the  
19 settlement agreement have been violated.

20 Then, finally, with respect to adequacy of  
21 representation, at least with respect to the Portland Police  
22 Association, the case law recognizes that we are -- at least  
23 where union rights or collective bargaining rights are at  
24 issue, there's an inadequacy of representation between  
25 antagonists, and, in addition, in an employer situation or

1 an employment situation, there's not a sufficiency of  
2 representation.

3 So that summarizes my view with respect to why the  
4 Portland Police Association is going to be afforded  
5 intervention as of right, at least with respect to the  
6 remedy stage -- and I'm not expressing any opinion right  
7 now -- and I'm expressly deferring ruling of their motion to  
8 intervene on liability. And we will address that if and  
9 when we have to.

10 Let me now turn briefly to the AMA Coalition and its  
11 motion for intervention, either as of right or permissive.  
12 I do want to begin by noting that the Court recognizes that  
13 the AMA Coalition has dedicated significant time and  
14 resources over many years to identifying possible issues and  
15 solutions concerning the Police Bureau and alleged practice  
16 of using excessive force. I also recognize that the  
17 AMA Coalition has extensive community outreach, a deep  
18 understanding of the issues, including those raised in this  
19 lawsuit and issues that are beyond those that are raised in  
20 the complaint in this lawsuit, and the AMA Coalition has an  
21 important perspective to bring to the remedy phase of this  
22 action -- and I do believe that the AMA Coalition can and  
23 will bring a valuable voice to the table during these  
24 proceedings as we discuss remedy.

25 But with respect to the legal requirements on a motion

1 to intervene, it does appear to me, and it's based upon  
2 Ninth Circuit precedent that holds that organizations that  
3 have an undifferentiated generalized income -- excuse me,  
4 generalized interest in the outcome of an ongoing action or  
5 organizations that have an interest comparable to a  
6 substantial portion of the population do not have a legally  
7 protectable interest for the technical purposes of  
8 intervention. And there, of course, I'm citing the *Southern*  
9 *California Edison* case from the Ninth Circuit.

10 I also note that the complaint in this case, crafted  
11 and filed by the United States, raises issues concerning and  
12 alleging unconstitutional practices relating to perceived or  
13 actual mental illness or mental crises and it does not  
14 contain any allegations or claims of such practices based on  
15 race.

16 The complaint filed by the AMA Coalition suffers from  
17 at least two problems. One of which is probably remediable;  
18 the other I don't think is.

19 The first problem is it asserts a claim under §14141,  
20 which only allows an action to be brought by the Attorney  
21 General in the name of the United States.

22 So §14141 does not contain a private cause of action  
23 and may not be asserted by anyone else, including the AMA  
24 Coalition.

25 I notice that the AMA Coalition acknowledges that and

1 in its pleadings says that if that's a problem, which it is,  
2 it asks for leave to replead and to assert a complaint or  
3 claim under §1983. 42 United States Code §1983.

4 That, however, doesn't solve the problem completely,  
5 because anyone certainly may, if they believe that they've  
6 got the legal and factual support to file a claim against  
7 the City or the Police Bureau or any individual officer  
8 alleging a §1983 violation. But in this case the plaintiff,  
9 the United States, has chosen to limit its complaint to  
10 issues relating to the treatment of those with perceived or  
11 actual mental illness or a mental crises. And the AMA  
12 Coalition's proposed complaint goes beyond that. It  
13 includes issues relating to race.

14 Now, I am not expressing any opinion at all as to  
15 whether or not there should or shouldn't be a complaint  
16 dealing with the issues that the AMA Coalition tries to  
17 bring in, but that's not this lawsuit, and I must confine  
18 myself to the lawsuit here as framed by the plaintiff in  
19 this lawsuit, the United States.

20 Now, the AMA Coalition argues that race is already  
21 included in the current lawsuit because the United States  
22 raised claims involving race in the Department of Justice's  
23 letter of findings, but those letter of findings do not  
24 constitute or establish the claims in this lawsuit. The  
25 complaint is the operative document that establishes the



1 scope, reach, and specific claims of this action, and the  
2 complaint does not contain any allegations related to  
3 excessive force based on race.

4 In addition, the AMA Coalition further argues that  
5 because the proposed settlement agreement contains a  
6 requirement that the Police Bureau documents demographic  
7 data regarding the subjects of police encounters and because  
8 that demographic data documentation will almost certainly  
9 include racial identification, therefore, argues the AMA  
10 Coalition, that the proposed settlement agreement seeks to  
11 address concerns of excessive force based on race.

12 I think that reads too much into the settlement  
13 agreement that's proposed.

14 The fact that the proposed settlement agreement tasks  
15 the Police Bureau with documenting general demographic data  
16 on police subjects does not expand the scope of this lawsuit  
17 to include claims of excessive force based on race. No such  
18 claims are alleged in the complaint filed by the United  
19 States. And at least with the lawsuit that's right now in  
20 front of me, I'm not going to expand this lawsuit beyond  
21 what the plaintiff has alleged in his complaint -- in its  
22 complaint.

23 Now, in terms of adequacy of representation by the  
24 existing parties, I know also the United States and the AMA  
25 Coalition share the same interest in remedying the alleged

1 pattern and practice by the Police Bureau of using excessive  
2 force in interactions with persons perceived as or actually  
3 suffering from mental illness or mental illness -- or mental  
4 health crises and that's a further reason to deny  
5 intervention as of right.

6 Now, with respect to permissive intervention, my  
7 concern, again, is primarily with the interest of the AMA  
8 Coalition in expanding the current lawsuit and its  
9 resolution beyond issues relating to mental health and  
10 mental illness. As I said, if anyone wants to bring a  
11 different lawsuit based on race, they have the legal right  
12 to do that. But that's not this lawsuit.

13 Therefore, I'm denying -- I'm using my discretion and  
14 denying the AMA Coalition intervention, even permissively.

15 However, as I said in the beginning of my comments, I  
16 do recognize the expertise, the efforts, and the valuable  
17 contributions the AMA Coalition can offer in resolving these  
18 issues, the issues raised by the complaint, even if  
19 we -- even if we just focus on and confine ourselves to the  
20 issues of the treatment of persons suffering from or  
21 perceived to be suffering from mental illness. And,  
22 therefore, I am granting enhanced amicus curiae, or friend  
23 of the court status for the AMA Coalition in at least the  
24 following five particulars -- they -- all of this is set  
25 forth in my written opinion. And unless someone convinces

1 me I'm wrong later this morning, you'll have this written  
2 opinion before the end of today.

3 Here are the five particulars that I see for the  
4 enhanced amicus curiae status for the AMA Coalition.

5 First, the AMA Coalition shall have the opportunity to  
6 present any briefing requested by the Court or allowed by  
7 the Court in the same manner as any of the parties.

8 Second, the AMA Coalition shall have the opportunity to  
9 participate in any oral arguments to the same extent as all  
10 of the other parties.

11 The AMA Coalition -- third, the AMA Coalition may  
12 present its arguments from counsel table, along with all  
13 other parties.

14 Fourth, the AMA Coalition may participate in the  
15 fairness hearing, to the extent as all other parties.

16 And, fifth, to the extent that the United States, the  
17 City, and the Portland Police Association may participate in  
18 mediated settlement discussions under the authority of the  
19 Court and a court-appointed special master for settlement  
20 purposes -- and I'll discuss that in a few minutes -- the  
21 AMA Coalition shall be invited and allowed to participate in  
22 those negotiations and discussions.

23 And, as a matter of fact, from this point forward, I'm  
24 going to be collectively referring to the United States, the  
25 City, the Portland Police Association, and the AMA Coalition

1 as the Parties, capital P, even though, technically, the AMA  
2 Coalition is, to be precise, only an enhanced amicus.

3 Now, if this remains my ruling, then where does that  
4 take us going forward? And I have a section in my opinion,  
5 it begins on page 18, entitled "Directions for Going  
6 Forward." And it starts, again, with the following  
7 proposition from the Ninth Circuit relying upon unambiguous  
8 Supreme Court precedent, and I'll repeat it again. Quote:  
9 Except as part of court-ordered relief after a judicial  
10 determination of liability, an employer cannot unilaterally  
11 change a collective bargaining agreement as a means of  
12 settling a dispute over whether the employer has engaged in  
13 constitutional violations, closed quote.

14 I think we all recognize a judicial determination of  
15 liability is not simply a conclusion following a fairness  
16 hearing that a proposed settlement agreement may be fair,  
17 reasonable, and appropriate, a judicial determination of  
18 liability requires, at a minimum, summary judgment on the  
19 merits concerning liability, or, more likely, if there's  
20 contested issues of fact, a trial on the merits on  
21 liability.

22 So with that as a foundation, it looks to me as if  
23 there are two questions that I need to answer before I can  
24 proceed to a fairness hearing.

25 Really, there's -- you know, depending on the answer to

1 one, the first question, there may be two and there may just  
2 be one. Here are the two questions as I see it. First:  
3 The Court must determine whether the proposed settlement  
4 agreement, in fact, prejudices the legal rights of the  
5 Portland Police Association under the labor agreement, under  
6 the collective bargaining agreement.

7 Now, if it doesn't, that's the end of the matter.  
8 We'll proceed to the fairness hearing. But if it does  
9 prejudice the legal rights of the Portland Police  
10 Association under the labor agreement, then I have to then  
11 answer the question as -- the second question, whether that  
12 conclusion necessarily precludes the authority of the Court  
13 to approve the settlement agreement without a prior judicial  
14 determination of liability.

15 It looks to me that the second question is answered in  
16 the affirmative, from the cases that I've read, and that's a  
17 number of cases -- one -- a few from the Ninth Circuit and a  
18 few from the Supreme Court, but there may be a split among  
19 the circuits. I identified, on page 19 of my opinion,  
20 several cases from the Tenth Circuit, the Eleventh, the  
21 Second and the former Fifth that may shed some light on  
22 this. It's sufficiently unclear that if we get to this  
23 issue I would want the benefit of briefing from the  
24 parties -- and of course I mean all four parties now -- and  
25 oral argument on that question.

1           So, to reiterate, first, does the proposed settlement  
2 agreement prejudice the legal rights of the Portland Police  
3 Association under the labor agreement -- under the labor  
4 agreement; and, second, if it does, does that necessarily  
5 preclude us from going forward with the fairness hearing?  
6 Do we need to then go to adjudication of the merits?

7           Now, we could proceed and start scheduling briefing and  
8 analysis on those two questions, but it struck me as perhaps  
9 more appropriate, more reasonable, maybe even more  
10 efficient, to afford the parties, now that they've had the  
11 benefit of this analysis from me, an opportunity to see if  
12 mediation can resolve those questions so that we don't need  
13 to deal with that, because perhaps mediation might result in  
14 an amended proposed settlement agreement, such that all four  
15 parties will agree that it does not prejudice the rights of  
16 the Portland Police Association under the labor agreement,  
17 and, therefore, there's no need to concern ourselves with  
18 the hypothetical than the counterfactual hypothetical of,  
19 well, what do I do? What am I allowed to do if it were to  
20 conflict?

21           Now, I do want to make something very clear, though,  
22 and I know this came up in the United States' brief toward  
23 the end, and I agree with it. This is not to say that the  
24 Portland Police Association may block such a consent decree  
25 merely by withholding its consent now that it is a party for

1 intervention purposes in the remedy phase.

2 It may not do that if the Court or the parties have  
3 resolved the issues that I've previously identified in my  
4 two questions. So that if there is a proposed amended  
5 settlement agreement or if I conclude that the settlement  
6 agreement, as actually crafted, doesn't violate the rights  
7 of the Portland Police Association, the fact that they are  
8 now a party by intervention does not mean they have the  
9 legal right to block a settlement by withholding their  
10 consent. The Supreme Court, frankly, in the *Local 93* case,  
11 specifically said they do not. Quoting from 478 U.S. at 529  
12 to 530. Quote: While the intervener is entitled to present  
13 evidence and have its objections heard at the hearings on  
14 whether to approve a consent decree, it does not have the  
15 power to block the decree nearly by withholding its consent,  
16 closed quote.

17 The Ninth Circuit, in *Southern California Edison*, is to  
18 the same effect. So the question for me is does the  
19 settlement agreement or perhaps an amended settlement  
20 agreement interfere or conflict with the rights under the  
21 collective bargaining agreement? If it does, then I think  
22 we have to address whether I even have the legal authority  
23 to approve it. But if it doesn't, then it doesn't matter if  
24 not all of the interveners or the Portland Police Bureau  
25 consents. So I'm repeating myself. I'll move on.

1 I do think it would be helpful to see if the parties  
2 want to make any changes to the proposed settlement  
3 agreement to address these issues, either by agreement or  
4 even perhaps without agreement. But I think the most  
5 efficient approach is to try to see if they can reach  
6 agreement on these issues, and, therefore, I am suggesting  
7 that shortly after this hearing the parties meet and see if  
8 they can agree on a specific mediator who would then be  
9 appointed by the Court to meet with all four parties --  
10 United States, City of Portland, PPA, and AMA Coalition --  
11 to see if there are changes that could or should be made to  
12 the proposed settlement agreement, not only to reflect, by  
13 the way, the issues that I've raised under the collective  
14 bargaining agreement, but to see if the AMA Coalition has  
15 any additional suggested changes that might be for the good.

16 I understand that the United States and the City have  
17 already engaged in extensive public solicitation and input  
18 and meeting with a number of organizations, and I commend  
19 that. But given submissions by the AMA Coalition and my  
20 views on the matter so far, I think it would be valuable for  
21 this process to ensure that the AMA Coalition could provide  
22 input as part of this mediation process.

23 And so what I'm asking all of the parties to do is to  
24 report to me no later than the end of this month,  
25 February 28th: Can all four parties agree on a mediator or



1 set -- small set -- of mediators? I have occasionally seen  
2 mediations and participated in mediations with two or even  
3 three mediators. If that's what you all want to do, that's  
4 fine with me. But do let me know whether you can agree on a  
5 mediator or mediation panel and let me know by February 28th  
6 if you can and have agreed. And if you have not agreed or  
7 cannot agree, then by February 28th of this year each party  
8 must send to me the names of three proposed mediators who  
9 are acceptable to that party.

10 Then I would like to hold a brief status conference to  
11 address any remaining issues concerning mediation, the  
12 appointment of the mediator, and matters like that.

13 If the parties are available, I would like to hold it  
14 on Tuesday, March 5th, at 12:15. I'm scheduled to be in the  
15 middle of a jury trial on a different matter that day, but  
16 I'll give you the lunch hour if you are available March 5th  
17 at 12:15. If not, let me know, and I'll find you some other  
18 time.

19 I would also direct that if there's going to be a  
20 mediation that it be completed in 45 days or -- 45 days from  
21 today, or not later than April 5th, 2013.

22 If you all want to make that date shorter and can  
23 agree, let me know. If you all agree that the date should  
24 be expanded and the deadline should be expanded and you can  
25 all agree, let me know.

1 I am sensitive that there is a value in moving this  
2 process forward and getting to resolution, and so I don't  
3 want to let this drag on too long. 45 days seems right to  
4 me, but if you all think or agree it should be shorter or  
5 longer, I'll be flexible on that.

6 So that then leads to the question of what happens if  
7 there's a mediation and you can't reach an agreement? Or  
8 what happens if you can't agree and there's no mediation?  
9 Well, then we're back to I need to address these basic  
10 questions of does the settlement agreement, either as it  
11 currently stands or as the United States and the City may  
12 wish to propose an amendment, does that violate the rights  
13 of the Portland Police Association; and, if so, what are the  
14 consequences for the Court's authority?

15 And there I would anticipate the following schedule --  
16 but, again, if you all think the schedule is either too long  
17 or too short, let me know, and I'll -- I'd like to hear what  
18 you have to say. But I would anticipate -- I would like the  
19 briefing of the parties on those issues as follows: All  
20 four parties can submit their views on that party with a  
21 brief filed on April 19th. And I envision two rounds of  
22 simultaneous briefing.

23 So I would like your opening thoughts on those two  
24 questions by April 19th. And if a party submits an opening  
25 brief on April 19th, then they will have the right to

1 respond, in writing, to the arguments submitted by any other  
2 party two weeks, then, thereafter, on May 3rd.

3 And then, finally, I'd like to hold an oral argument on  
4 that question. And the date that looks good for me, but  
5 I'll be interested in your input on this, as well, would be  
6 Thursday, May 23rd, at 9:00 a.m.

7 Again, if you are all available for that -- because I  
8 think we need to resolve those issues before deciding about  
9 scheduling of the fairness hearing if we can go in that  
10 direction.

11 Finally, let me say a few words briefly about the  
12 fairness hearing, because I don't think, in light of what I  
13 said, it makes sense to go into much more detail about it  
14 now. But I'm very appreciative of all the comments that  
15 everyone has put in so far about how the fairness hearing  
16 should look, how it should be conducted, and how that should  
17 be held. Not only the comments from the four parties, but a  
18 number of public comments I have received and appreciate.

19 I am concerned about several things, and my concerns  
20 are inconsistent. I'm concerned that there may be people  
21 who have difficulty getting to the courthouse in downtown  
22 Portland. There may be people who have difficulty getting  
23 to the courthouse during normal business hours. At one  
24 point I was -- I'm still thinking about possibilities of  
25 holding an evening session at the courthouse or a Saturday

1 session. I am concerned, based upon the security needs and  
2 precedent mostly, in terms of how federal courts conduct  
3 their business, I don't think I'll be holding a session  
4 outside of the courthouse. I don't think that's the right  
5 precedent to set.

6 I'm also concerned a little bit about the finances of  
7 evening hearings at the courthouse or on a Saturday. We  
8 have to pay courtroom security officers for that. It's not  
9 out of the question. It's a possibility. I'm also  
10 concerned about some of the arguments that folks have made  
11 about need for child care for people who want to testify.

12 Therefore, the idea I'm thinking about -- again, we  
13 don't need to resolve it right now, but the idea that I'm  
14 thinking about, to share this with you, is -- well,  
15 obviously, anyone who wants to submit written comments can  
16 submit written comments, but for those who wish to speak  
17 orally about this -- when we have a fairness hearing, the  
18 public participation, the folks aren't placed under oath,  
19 the folks aren't subject to cross-examination, and one of  
20 the suggestions that we received -- and I think, frankly, it  
21 came from Ms. Hardesty -- was we could do a number of that  
22 testimony by videotape. I think that's a very smart idea.

23 I don't know whether this would be coordinated by AMA  
24 Coalition or by the City or by some combination, but before  
25 the actual fairness hearing, folks can appear at a

1 convenient location and at a convenient time to them, can  
2 say what they want to say on a videotape or on a video  
3 recording, we can all review it. Whether we review it in  
4 advance or watch it all together during a fairness hearing  
5 here, we will all get the benefit of their comments for  
6 people who don't wish to simply submit something in writing.

7 That seems, to me, to be an appropriate resolution of  
8 the concerns of what do we do about folks that want to say  
9 something but either don't want to or can't say something in  
10 writing, don't want to or can't appear in downtown Portland  
11 or appear during regular business hours. So we can think  
12 about that, talk about that further, but I don't think we  
13 need to resolve those issues at this time.

14 Now, I've said an awful lot, and at this time if anyone  
15 wants to either comment on anything I've said or --  
16 including, if you want, to tell me that I've made some  
17 significant and material errors, either in law or fact, you  
18 have the opportunity to do that.

19 We'll start with the United States, proceed to the  
20 City, and then proceed to Portland Police Association, and  
21 then to AMA Coalition.

22 The United States?

23 MR. GEISLER: Thank you, Your Honor. We would  
24 like to echo the Court's sentiment with respect to the AMA.  
25 In fact, we appreciate the depth of understanding that the

1 AMA and its members possess. Likewise, we also appreciate  
2 the PPA members and the depth of understanding that they  
3 possess and the contributions they have to offer.

4 Your Honor, no, we wouldn't waive any specific  
5 arguments at this point in time. Your Honor, if we may be  
6 so bold as to ask the Court a question to get a better  
7 understanding of the parameters of the Court's holding.  
8 With respect to the issues that would be the subject of  
9 mediation between the PAA, City, and the United States, may  
10 we take it that the issues would, one, be limited to the  
11 Police Bureau, that is to the exclusion of BOEC, which is  
12 the 911 dispatchers for the City, and to the exclusion of  
13 Community Mental Health, and may we further take it that  
14 there would be a limitation as to what is the subject of  
15 mandatory bargaining versus permissive bargaining under the  
16 state's labor laws, such that the PPA would be required to  
17 show that the subject for which they want to intervene have  
18 an interest. That is within mandatory bargaining.

19 Thank you, Your Honor.

20 THE COURT: Let me answer that as follows: My  
21 main concern with respect to the PPA issues is that the  
22 tentative analysis that I have is that if the settlement  
23 agreement were to be implemented as currently drafted and if  
24 there were to be conflicts in implementation as the City and  
25 the Portland Police Association were to move forward in

1 collective bargaining with respect to some aspects of the  
2 implementation of the settlement agreement, and if they were  
3 unable to resolve that, then, to the extent that the United  
4 States were to bring a motion in this Court under its  
5 supervisory authority under the settlement agreement, to  
6 enforce the settlement agreement, we would have a conflict  
7 in that I do not believe that in the context of approving a  
8 settlement agreement or having approved a settlement  
9 agreement I could then order changes be made to the  
10 collective bargaining agreement. That's why I have concerns  
11 about the agreement as currently crafted.

12 If those concerns either are incorrect or can be  
13 addressed with a modification to the settlement such that  
14 the Portland Police Association's collective bargaining  
15 rights would be preserved and not infringed upon, that takes  
16 care of that problem.

17 Or the other way to proceed is that to whatever extent  
18 the United States may wish to have the collective bargaining  
19 agreement modified in order to accomplish its objectives in  
20 this lawsuit, and I know that there's some beginning  
21 discussions already taking place, as the parties have told  
22 me, between the City and United States, perhaps those can be  
23 expedited, accelerated, and concluded, so that those issues  
24 that may pose a problem can be addressed before we have to  
25 deal with the fairness hearing and the question of whether

1 or not I can approve the proposed settlement agreement or an  
2 amended proposed settlement agreement.

3 So to that extent I'm not going to artificially cabin  
4 what the parties want to discuss in mediation, but I think  
5 you all have an idea now of what my concerns would be so  
6 that even if you can't reach agreement on everything and  
7 still have some remaining disputes, some of those disputes  
8 may not affect my legal ability to approve a settlement  
9 agreement if I conclude it's otherwise fundamentally fair  
10 reasonable, and appropriate. But some of the disputes  
11 might, and those would be the disputes that you might wish  
12 to focus on.

13 Whether or not you can resolve or want to resolve other  
14 matters, I think, in the first instance, I should leave that  
15 to the parties. And that leads me to the AMA Coalition,  
16 because some of the issues of the AMA Coalition, at least  
17 those relating to mental health, either the reality of or  
18 perception of mental health issues, may have -- may very  
19 well wish to be addressed by the parties now rather than  
20 here, perhaps quite legitimate issues, at a fairness hearing  
21 down the road.

22 So even though it's not necessary to address those  
23 issues now in order to deal with my concerns over legal  
24 authority, if we were to reach a stage where a fairness  
25 hearing were to raise quite serious issues with the



1 reasonableness or fairness or appropriateness and  
2 reasonableness of the settlement agreement, why not deal  
3 with them now?

4 And so that's the best guidance that I can provide at  
5 this time without unreasonably cabining what those voluntary  
6 discussions might be on the parties.

7 I know I'm not really answering your question in full,  
8 but that's as much of an answer that I think is appropriate  
9 to give at this time.

10 Anything further, Mr. Geissler?

11 MR. GEISLER: Your Honor, if I may, would the  
12 Court permit briefing on the issue of the areas that are  
13 within mandatory versus permissive bargaining under the  
14 state's labor laws, as we find unclear right now the PPA's  
15 assertion that the nonexhaustive list attached to its brief  
16 sets forth the areas that should be the subject of  
17 mediation?

18 THE COURT: The short answer to that question is  
19 yes. But it's a matter of timing. That's what I'm talking  
20 about, in large part, when I scheduled the April 19th  
21 briefing schedule. But I don't think it's a good  
22 idea -- you all can try to talk me out of it if you want,  
23 but my initial thinking is why should I resolve some of  
24 those legal questions now that the parties, when they talk  
25 to each other, might be able to resolve themselves? And I

1 will then only have to resolve those issues that the parties  
2 can't resolve themselves.

3 I recognize that there were pages and pages in tabular  
4 form by the Portland Police Association that they contend  
5 are provisions of the labor agreement that were -- that may  
6 be impaired by the settlement agreement.

7 I also see the United States used -- the phrase used in  
8 your brief -- there's only a small number of those that  
9 really may be impaired.

10 Well, why don't you try to resolve all of those that  
11 the parties can resolve right now, and if there are any that  
12 remain, that the parties cannot resolve and that require the  
13 Court's rulings, that remain, all right, that's what that  
14 April 19th briefing is for.

15 But I think it's more efficient for you all to  
16 communicate and see how much you can resolve. You might be  
17 able to resolve all of them or come up with a process to  
18 resolve all of them, and you might not. And if you can't,  
19 that's what I envision with my April 19th briefing. And  
20 then you can let me know whether you're able to resolve some  
21 and therefore propose an amended proposed settlement  
22 agreement or not.

23 That's how I -- that's how I think it would be more  
24 efficient.

25 First, does the United States disagree with that, or

1 should we give that a try?

2 MR. GEISLER: Your Honor, I believe that we would  
3 want to have some internal deliberations; but, if I  
4 understand Your Honor properly, the direction from the Court  
5 is that we attempt mediation before we proceed with  
6 briefing.

7 THE COURT: Yes.

8 MR. GEISLER: I believe we find that a  
9 well-founded suggestion. Thank you, Your Honor.

10 THE COURT: Yes. And that's why what I envision  
11 is let me know by February 28th if you can agree on a  
12 mediator. If you can send me the names of each party of  
13 three people that are acceptable. And assuming that dates  
14 work for you all, we'll have a brief status conference on  
15 March 5th, Tuesday, at 12:15, and then we'll see if we can  
16 get mediation completed hopefully by April 5th.

17 That basically gets you a month to get that done. But  
18 if not or if there's still remaining issues that need to be  
19 briefed, that's what the April 19th is for.

20 And, by the way, if you all can agree and want to  
21 propose an alternative schedule, I'm certainly open to that.  
22 But I thought that the most efficient thing for me to do is  
23 to put something on the table first.

24 Before turning to the City, anything further from the  
25 United States?

1 MR. GEISLER: Yes, Your Honor. We'd appreciate  
2 direction from the Court as to the cost of the mediator or  
3 mediators. If the Court would anticipate that the Court's  
4 funds would be sufficient to cover those costs, we would  
5 appreciate that notation now.

6 THE COURT: Let's discuss that on March 5th. I  
7 don't know the answer to that.

8 MR. GEISLER: Thank you, Your Honor.

9 THE COURT: Anything from the City now?

10 MR. VAN DYKE: I just want to be -- thank you,  
11 Your Honor. I don't -- I don't have any particular comments  
12 on the proposed Court's order, which we'll look at in more  
13 detail later today. I just want to let the Court know that  
14 there's a number of moving pieces going on simultaneously at  
15 the City. We have a budget with a large hole to cut and  
16 we -- some of those cuts will probably -- although I'm not  
17 going to make that decision -- be directed to the Portland  
18 Police Bureau. We have collective bargaining talks started  
19 with the Union, and we also have this proceeding going on.

20 It's very hard for me to figure out exactly how all  
21 those moving pieces are going to fit at one time, and I just  
22 want to let Your Honor know that the decisions that the City  
23 might make, in terms of budget or in terms of collective  
24 bargaining agreement, we're going to have to make -- we may  
25 have to make some of those before we get back in front of

1 Your Honor and rule -- we're not trying to preempt  
2 Your Honor's ruling in any way or tilt the playing field,  
3 but we will have to go forward on those, as well.

4 THE COURT: Thank you, Mr. Van Dyke. I fully  
5 appreciate that. That's why I also suggest if you all want  
6 to propose alternative schedules, let me know. My  
7 assumption was the parties wanted to move forward with this  
8 process with dispatch and diligence; but, to the extent you  
9 all want to propose alternatives, you're welcome to do that.

10 I completely agree that and see that we probably are  
11 balancing multiple issues simultaneously. And that's why I  
12 thought the approach that I've outlined here, at least from  
13 my perspective, is the best way to try to accomplish dealing  
14 with that, rather than dealing with things in isolation.  
15 I'm fully appreciative of what you're saying, and I  
16 recognize that.

17 Let me hear next from the Portland Police Association.

18 MR. KARIA: Thank you, Your Honor. I have no  
19 particular comment at this time on the proposed scheduling  
20 going forward.

21 One question, though, for Your Honor is at what  
22 juncture do you anticipate needing to revisit the deferred  
23 question of liability as it pertains to the intervention  
24 motions by both PPA and the AMA Coalition?

25 THE COURT: If a fairness hearing does not result

1 in the approval of a settlement agreement. If I don't have  
2 the legal authority to approve the settlement agreement, as  
3 I previously outlined, well, then, I can't approve a  
4 settlement agreement.

5 Even if I do have the legal authority, if I conclude  
6 that it's not fundamentally fair, reasonable, and  
7 appropriate, and I therefore disapprove of it, well, we then  
8 may need to deal with litigation on the merits of the  
9 underlying claim. In which case, before we address the  
10 questions of what discovery, if any, do any parties want,  
11 and before we address whether or not this can or should be  
12 resolved on summary judgment or a bench trial, we would need  
13 to address the question of which parties are going to be in  
14 by intervention.

15 And by that point I would allow both Portland Police  
16 Association and the AMA Coalition to renew their motions to  
17 intervene on the liability phase.

18 Does that answer that question?

19 MR. KARIA: Yes, sir. Thank you.

20 THE COURT: Anything further from the Portland  
21 Police Association?

22 MR. KARIA: No, sir.

23 THE COURT: Let me hear from the AMA Coalition, if  
24 you wish.

25 MS. ALBIES: Thank you, Your Honor. We certainly

1 appreciate the Court's recognition of the AMA's  
2 contributions to police oversight in Portland and the many  
3 years of experience and the depth of knowledge that it  
4 brings.

5 In terms of the adequacy of representation, the DOJ,  
6 representing the AMA Coalition's point of view, I just want  
7 to make very clear that the AMA, while we certainly  
8 appreciate the work that the DOJ has put in, the community  
9 that the AMA represents has a very different perspective  
10 having been subjected to excessive force by the Portland  
11 Police Bureau, so we bring that perspective, and, again, I  
12 appreciate the Court recognizes that.

13 And so I would contest that we have a generalized  
14 interest, because it's a very specific interest based on  
15 people who have been subjected to excessive force and been  
16 targeted by the Police Bureau.

17 And in terms of the Court's comments that the AMA  
18 sought to or seeks to expand the suit beyond the scope of  
19 the complaint, obviously, as clear from our briefing, the  
20 AMA -- one of the AMA's primary concerns was that race was  
21 not addressed in this suit, and obviously that's a different  
22 discussion for a different day, unfortunately that -- that  
23 it's not addressed in the suit. But, again, we understand  
24 that as -- as the parameters of the suit and the parameters  
25 law.

1           And I will note that the AMA is committed to what this  
2       suit does seek to address. It does not seek to expand it.  
3       And to the extent that the AMA's participating in any future  
4       proceedings, that we intend to push the Department of  
5       Justice and the City and all the parties to make this  
6       agreement as strong as possible to make sure it has the  
7       broadest effect and as strong as it possibly can be.

8           With that said, we don't seek to expand the suit, and  
9       we -- we just seek to strengthen what's going on. Thank  
10      you.

11           THE COURT: Thank you. Can everyone make and --  
12      yeah?

13           MR. GEISLER: Sorry, Your Honor. May I ask one  
14      more question?

15           THE COURT: Of course.

16           MR. GEISLER: In response to Mr. Karia's  
17      question, Your Honor said that the Court would revisit the  
18      issue of the merits motion if the Court could not approve a  
19      final settlement agreement. Your Honor, my concern is, only  
20      to be cautious, not at all to -- to indicate a current or  
21      future position for the United States, but in a -- in an  
22      attempt to be cautious, it appears that the settlement  
23      agreement determination would occur more than 60 days out  
24      from today, the date of today's ruling, which would indicate  
25      that time in which a party could appeal would pass on the



1 60th day.

2 In order that we preserve the right to appeal, the  
3 intervention of right on the PPA on the current grounds,  
4 remedy grounds, may I ask the Court to extend by its order  
5 the date of appeal to whatever date is finally used for the  
6 final determination on the settlement agreement?

7 THE COURT: To the extent I have the authority to  
8 do that, yes, I do that right now. To the extent, I don't,  
9 I'll let you all worry about that. If you want a 1292 or  
10 some type of other interlocutory order, submit something,  
11 and I'll make sure that the United States has its right to  
12 appeal.

13 To the extent that's within my authority to extend, I  
14 so extend.

15 MR. GEISLER: Thank you, Your Honor.

16 THE COURT: All right. Can folks meet in a brief  
17 status conference here on Tuesday, March 5th, at 12:00?  
18 Will that work?

19 MR. GEISLER: Your Honor, for the United States,  
20 may I appear by telephone, since I arrived from D.C. and my  
21 colleagues, I'm sure, will appear in person?

22 THE COURT: Yes. I'm desirous of not wanting to  
23 excluded the public from any of these proceedings, otherwise  
24 I would suggest we have an in chambers telephone conference,  
25 but I'll be in open court. I would like to see if people

1 are available locally, they can be in open court. But  
2 anyone who needs to appear by telephone, just let  
3 Mary Austad, our courtroom deputy, know. We'll be here in  
4 open court but will be able to receive, by telephone, any  
5 participation from anyone who must and desires to  
6 participate by telephone.

7 MS. BROWN: Your Honor, for the United States,  
8 Adrian Brown and Bill Williams will be available in person.

9 MR. VAN DYKE: The City is available on that date.

10 MR. KARIA: The Association is available, sir.

11 MS. ALBIES: Somebody from the AMA will be  
12 available.

13 THE COURT: Very good. We'll have the next status  
14 conference, Tuesday, March 5th, 2013, at 12:15 p.m. In  
15 addition, please remember to let me know, and you can do  
16 this by email to our courtroom deputy, Mary Austad, her  
17 email is found on the court's website under my name. Just  
18 send Mary an email letting me know if -- by February 28th if  
19 you all agreed on a mediator or mediation panel; or, if  
20 you've been unable to agree, please give Mary three names of  
21 mediators who will be acceptable to your client or to each  
22 individual parties separately.

23 All right. Is there anything else anyone wants me to  
24 address in this morning's hearing?

25 For the United States?

1 MR. GEISLER: Nothing more, Your Honor.

2 THE COURT: The City?

3 MR. VAN DYKE: Nothing more, Your Honor.

4 THE COURT: PPA?

5 MR. KARIA: No, sir.

6 THE COURT: AMA Coalition?

7 MS. ALBIES: No. Thank you, Your Honor.

8 THE COURT: Thank you all very much, and thank you

9 all for the excellent briefing, too. It's very helpful.

10 I expect you will have my final written decision by  
11 11:00 a.m. It will be issued in the MC/ECF system by 11:00  
12 this morning.

13 MR. GEISLER: Thank you, Your Honor.

14 DEPUTY COURTROOM CLERK: Court's in recess.

15 (Hearing concluded.)

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## C E R T I F I C A T E

I certify, by signing below, that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Erwin

Jill L. Erwin, RMR, CRR  
Official Court Reporter

Date: February 26, 2013